3/22/19

Chapter No. 394 19/HR43/R1139SG NN / EW

HOUSE BILL NO. 872

Originated in House ______

_____ Clerk

HOUSE BILL NO. 872

AN ACT TO AMEND SECTION 63-17-73, MISSISSIPPI CODE OF 1972, TO PROHIBIT A MOTOR VEHICLE MANUFACTURER, DISTRIBUTOR, WHOLESALER OR ANY FACTORY, BRANCH OR DIVISION THEREOF FROM COERCING A MOTOR VEHICLE DEALER INTO CONSTRUCTING OR SUBSTANTIALLY ALTERING A FACILITY OR PREMISES UNDER CERTAIN CONDITIONS; TO PRESCRIBE STANDARDS FOR MOTOR VEHICLE MANUFACTURERS TO REGULATE COSTS AND MANAGEMENT OF INVENTORY BETWEEN MOTOR VEHICLE MANUFACTURERS AND ITS FRANCHISEES; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 63-17-73, Mississippi Code of 1972, is amended as follows:

- 63-17-73. (1) It is unlawful * * *:
- (a) For any person, firm, association, corporation or trust to engage in business as, or serve in the capacity of, or act as a motor vehicle dealer, motor vehicle salesman, manufacturer, distributor, wholesaler, factory branch or division, distributor branch or division, wholesaler branch or division, factory representative or distributor representative, as such, in this state without first obtaining a license therefor as provided in the Mississippi Motor Vehicle Commission Law, regardless of

whether or not the person, firm, association, corporation or trust maintains or has a place or places of business in this state. Any person, firm, association, corporation or trust engaging, acting or serving in more than one (1) of the capacities or having more than one (1) place where the business is carried on or conducted shall be required to obtain and hold a current license for each capacity and place of business.

- (b) For a motor vehicle dealer or a motor vehicle salesman:
- (i) To require a purchaser of a new motor vehicle, as a condition of sale and delivery thereof, to also purchase special features, appliances, equipment, parts or accessories not desired or requested by the purchaser. However, this prohibition shall not apply as to special features, appliances, equipment, parts or accessories which are already installed on the car when received by the dealer.
- (ii) To represent and sell as a new motor vehicle any motor vehicle which has been used and operated for demonstration purposes or which is otherwise a used motor vehicle.
- (iii) To resort to or use any false or misleading advertisement in connection with his business as a motor vehicle dealer or motor vehicle salesman.
- (iv) To sell an extended service contract, extended maintenance plan or similar product that is not offered, endorsed or sponsored by a manufacturer or distributor without

disclosing to the consumer, orally and in writing, that the offered product is not provided or supported by a manufacturer or distributor.

- (c) For a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesaler branch or division, or officer, agent or other representative thereof, to coerce, or attempt to coerce, any motor vehicle dealer:
- (i) To order or accept delivery of any motor vehicle or vehicles, appliances, equipment, parts or accessories therefor, or any other commodity or commodities which shall not have been voluntarily ordered by the motor vehicle dealer.
- (ii) To order or accept delivery of any motor vehicle with special features, appliances, accessories or equipment not included in the list price of the motor vehicles as publicly advertised by the manufacturer thereof.
- (iii) To order for any person any parts,
 accessories, equipment, machinery, tools, appliances or any
 commodity whatsoever.
- (iv) To contribute or pay money or anything of value into any cooperative or other advertising program or fund.

This paragraph (c) shall not apply to manufacturers of motor homes governed by the provisions of Sections 63-17-201 through 63-17-221.

- (d) For a manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesaler branch or division, or officer, agent or other representative thereof:
- (i) To refuse to deliver in reasonable quantities and within a reasonable time after receipt of dealer's order to any duly licensed motor vehicle dealer having a franchise or contractual arrangement for the retail sale of new motor vehicles sold or distributed by such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division or wholesale branch or division, any motor vehicles as are covered by such franchise or contract specifically publicly advertised by the manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division or wholesale branch or division, to be available for immediate delivery. However, the failure to deliver any motor vehicle shall not be considered a violation of this subsection if the failure is due to acts of God, work stoppages or delays due to strikes or labor difficulties, freight embargoes or other causes over which the manufacturer, distributor or wholesaler, or any agent thereof, has no control.
- vehicle dealer to enter into any agreement, with the manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof, or to do any other act

prejudicial to the dealer by threatening to cancel any franchise or any contractual agreement existing between the manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, and the dealer. However, good-faith notice to any motor vehicle dealer of the dealer's violation of any terms or provisions of the franchise or contractual agreement shall not constitute a violation of this subsection.

(iii) To terminate or cancel the franchise or selling agreement of any dealer without due cause. The nonrenewal of a franchise or selling agreement, without due cause, shall constitute an unfair termination or cancellation, regardless of the terms or provisions of such franchise or selling agreement. "Due cause" shall be defined as a breach by the dealer of a material provision of the franchise agreement which breach has not been cured within a reasonable time after the dealer has been given written notice of the breach. The burden of proving that due cause exists shall be upon the party attempting to terminate, cancel or not renew the franchise or selling agreement. manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof shall notify a motor vehicle dealer in writing, and forward a copy of the notice to the commission, of the termination or cancellation of the franchise or selling agreement of the dealer at least sixty

(60) days before the effective date thereof, stating the specific grounds for such termination or cancellation. The manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesaler branch or division, or officer, agent or other representative thereof shall notify a motor vehicle dealer in writing, and forward a copy of the notice to the commission, at least sixty (60) days before the contractual term of his franchise or selling agreement expires that the franchise or selling agreement will not be renewed, stating the specific grounds for the nonrenewal, in those cases where there is no intention to renew the franchise or selling agreement. In no event shall the contractual term of any franchise or selling agreement expire, without the written consent of the motor vehicle dealer involved, prior to the expiration of at least sixty (60) days following such written notice. Any motor vehicle dealer who receives written notice that his franchise or selling agreement is being terminated or cancelled or who receives written notice that his franchise or selling agreement will not be renewed, may, within the sixty-day notice period, file with the commission a verified complaint for its determination as to whether the termination or cancellation or nonrenewal is unfair within the purview of the Mississippi Motor Vehicle Commission Law, and the franchise agreement shall continue in effect until final determination of the issues raised in the complaint

notwithstanding anything to the contrary contained in the law or in the franchise or selling agreement.

attempt to coerce a dealer, by franchise agreement or otherwise, or as a condition to the renewal or continuation of a franchise agreement, to materially change the dealer's method of conducting business, not including its facilities, if the change would impose substantial and unreasonable financial hardship on the business of the motor vehicle dealer in light of the business objective of the proposed change, unless the change is voluntarily agreed to by the dealer for separate and valuable consideration.

vehicle to any motor vehicle dealer at a lower actual price therefor than the actual price charged to any other motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device, including, but not limited to, sales promotion plans or programs which result in such lesser actual price. The provisions of this subparagraph shall not apply so long as a manufacturer, distributor or wholesaler, or any agent thereof, offers to sell or sells new motor vehicles to all motor vehicle dealers at the same price. This subparagraph shall not be construed to prevent the offering of volume discounts if such discounts are equally available to all franchised motor vehicle dealers of the same line or make in this state.

The provisions of this subsection shall not apply to sales to a motor vehicle dealer of any motor vehicle ultimately sold, donated or used by such dealer in a driver education program, to sales to a motor vehicle dealer for resale to any unit of government, federal, state or local, or to bona fide fleet sales.

(vi) To offer to sell or to sell parts and/or accessories to any new motor vehicle dealer for use in his own business for the purpose of repairing or replacing the same or a comparable part or accessory, at a lower actual price therefor than the actual price charged to any other new motor vehicle dealer for similar parts and/or accessories for use in his own business. However, it is recognized that certain motor vehicle dealers operate and serve as wholesalers of parts and accessories to retail outlets, and nothing herein contained shall be construed to prevent a manufacturer, distributor or wholesaler, or any agent thereof, from selling to a motor vehicle dealer who operates and serves as a wholesaler of parts and accessories, the parts and accessories as may be ordered by such motor vehicle dealer for resale to retail outlets, at a lower actual price than the actual price charged a motor vehicle dealer who does not operate or serve as a wholesaler of parts and accessories.

(vii) To prevent or attempt to prevent by contract or otherwise any motor vehicle dealer from changing the capital structure of his dealership or the means by or through which he finances the operation of his dealership, provided the motor

vehicle dealer at all times meets any capital standards agreed to between the dealership and the manufacturer, distributor or wholesaler, provided such standards are deemed reasonable by the commission.

(viii) To prevent or attempt to prevent by contract or otherwise any motor vehicle dealer or any officer, partner or stockholder of any motor vehicle dealer from selling or transferring any part of the interest of any of them to any other person or persons or party or parties. However, no motor vehicle dealer, officer, partner or stockholder shall have the right to sell, transfer or assign the franchise or any right thereunder without the consent of the manufacturer, distributor or wholesaler which consent shall not be unreasonably withheld.

extension of a franchise on a motor vehicle dealer's substantial renovation of the motor vehicle dealer's place of business or on the construction, purchase, acquisition or rental of a new place of business by the motor vehicle dealer. The manufacturer shall notify the motor vehicle dealer in writing of its intent to impose such a condition within a reasonable time prior to the effective date of the proposed renewal or extension, but in no case less than one hundred eighty (180) days prior to the renewal or extension. Upon receipt of written notification, a motor vehicle dealer shall have sixty (60) days to file a protest with the commission, and the manufacturer shall demonstrate to the

commission the need for the demand in view of the need to service the public and the economic conditions existing in the motor vehicle industry and the market area served by the motor vehicle dealer at the time the action would be required of the motor vehicle dealer. As part of any such condition the manufacturer shall offer the motor vehicle dealer a reasonable initial supply and model mix of motor vehicles to meet the sales levels necessary to support the increased overhead incurred by the motor vehicle dealer by reason of the renovation, construction, purchase or rental of a new place of business consistent with nationally applied standards.

motor vehicle dealer to refrain from participation in the management of, investment in, the acquisition of, or the current operation of any other line of motor vehicles or related products, as long as the motor vehicle dealer maintains a reasonable line of credit for each dealership and the motor vehicle dealer remains in substantial compliance with reasonable facilities' requirements of the manufacturer or distributor. The reasonable facilities' requirements may not include any requirement that a motor vehicle dealer establish or maintain exclusive facilities, personnel or display space when the requirements are unreasonable considering current economic conditions in the market area and not otherwise justified by reasonable business considerations. The burden of proving by a preponderance of the evidence that the current

economic conditions and reasonable business considerations justify exclusive facilities is on the manufacturer. Voluntary and noncoerced acceptance of such conditions by the motor vehicle dealer in writing for separate and valuable consideration shall not constitute a violation.

(xi) To fail or refuse to sell or offer to sell to all motor vehicle dealers in a line or make, every motor vehicle sold or offered for sale under the franchise agreement to any motor vehicle dealer of the same line or make; or to unreasonably require a motor vehicle dealer to pay an extra fee, purchase unreasonable advertising displays or any other materials, or to unreasonably require the dealer-operator to remodel, renovate or recondition its existing facilities as a prerequisite to receiving a certain model or series of vehicles. However, the failure to deliver any such motor vehicle shall not be considered a violation of this section if the failure is not arbitrary and is due to a lack of manufacturing capacity or to a strike or labor difficulty, a shortage of materials, a freight embargo or other cause of which the manufacturer or distributor has no control. This provision shall not apply to manufacturers of recreational vehicles.

(xii) To condition the sale, transfer, relocation or renewal of a franchise or dealer agreement or to condition sales, services, parts or finance incentives upon site-control agreement; however, voluntary and noncoerced acceptance of such

conditions by the motor vehicle dealer in writing, shall not constitute a violation.

(xiii) To assign or change a motor vehicle dealer's market area under the franchise or motor vehicle dealer's agreement arbitrarily or without due regard to the present or projected future pattern of motor vehicle sales and registrations within the motor vehicle dealer's market area, and without first having provided the motor vehicle dealer's with written notice of the change in the motor vehicle dealer's market area and a detailed description of the change and reasons therefor.

(xiv) To attempt to coerce, or coerce, a motor vehicle dealer to adhere to performance standards that are not applied uniformly to other similarly situated motor vehicle dealers.

program for measuring motor vehicle dealer's performance that may have a material impact on a motor vehicle dealer that is not fair, reasonable and equitable, or applying any such standard or program to a motor vehicle dealer in a manner that is not fair, reasonable and equitable. If dealership performance standards are based on a survey, the manufacturer or distributor shall establish the objectivity of the survey process and provide this information to any motor vehicle dealer covered by the survey request. Within fifteen (15) business days of a request by the motor vehicle dealer, a manufacturer shall disclose in writing to the motor

vehicle dealer a description of the performance standard or program and all relevant information used in the application of the performance standard or program to that motor vehicle dealer unless the manufacturer has already provided the information.

which the new motor vehicle dealer had ordered for the ultimate purchasers prior to the motor vehicle dealer's receipt of written official price increase notification. A sales contract signed by the ultimate purchaser that includes model and firm price shall constitute evidence of each such order provided that the vehicle is in fact delivered to that purchaser.

(xvii) To attempt to require, coerce or attempt to coerce any new motor vehicle dealer to sell, offer to sell or sell exclusively an extended service contract, extended maintenance plan or similar product, including, without limitation, GAP products, offered, endorsed or sponsored by the manufacturer or distributor by any of the following means:

- 1. By an act or statement made by the manufacturer or distributor that will adversely impact the motor vehicle dealer whether it is express or implied; or
- 2. By a provision in a franchise agreement that the motor vehicle dealer shall sell, offer to sell or sell exclusively an extended service contract, extended warranty plan or similar product offered, endorsed or sponsored by the manufacturer or distributor; or

3. By measuring the motor vehicle dealer's performance under the franchise agreement based on the sale of extended service contracts, extended maintenance plans or similar products offered, endorsed or sponsored by the manufacturer or distributor; or

4. By requiring the motor vehicle dealer to actively promote the sale or extended service contracts, extended maintenance plans or similar products offered, endorsed or sponsored by the manufacturer or distributor.

Nothing in this subparagraph shall prohibit a manufacturer or distributor from providing incentive programs to a new motor vehicle dealer who makes the voluntary decision to offer to sell, sell or sell exclusively an extended service contract, extended maintenance plan or similar product offered, endorsed or sponsored by the manufacturer or distributor.

(xviii) To require a motor vehicle dealer to provide its customer lists or service files to the manufacturer or distributor, unless necessary for the sale and delivery of a new motor vehicle to a consumer, to validate and pay consumer or dealer incentives, for reasonable marketing purposes, for evaluation of dealer performance, for analytics or for the submission to the franchisor for any services supplied by the franchisee for any claim for warranty parts or repairs. Nothing in this section shall limit the franchisor's ability to require or

use customer information to satisfy any safety or recall notice obligation or other legal obligation.

vehicle dealer's nonpublic customer information to another motor vehicle dealer unless the franchise has been terminated, the customer has relocated to an address that is outside of the motor vehicle dealer's market area, the customer has transacted business with another motor vehicle dealer of the same brand, a customer has not transacted with the dealer from which a vehicle was purchased for a period of nine (9) months, or the motor vehicle dealer consents to the sharing of customer information with other dealers.

(xx) To coerce, attempt to coerce, require or attempt to require any motor vehicle dealer to provide installment financing with a specified financial institution.

dealer or successor dealer to construct or substantially alter a facility or premises if such construction or alteration would be unreasonable under the circumstances.

dealer or successor dealer to construct or substantially alter a facility or premises if the same area of the facility or premises has been constructed or substantially altered within the last ten (10) years and the construction or alteration was required and approved by the manufacturer as a part of a program, standard or

policy, except for improvements made to comply with health or safety laws, or to accommodate the technology requirements necessary to sell or to service a motor vehicle. As used in this subsection, "substantially alter" means an alteration that substantially impacts the architectural features, characteristics, or integrity of a structure or lot. The term does not include routine maintenance reasonably necessary to maintain a dealership in attractive condition, or items directly protected by federal intellectual property rights of the manufacturer. If, during such ten-year period, the manufacturer revises an existing, or establishes a new program, standard, policy, bonus, incentive, rebate, or other benefit for the construction or substantial alteration of a dealership facility or premises, a motor vehicle dealer who completed a facility as a part of a prior program, standard, or policy within the ten-year period and elects not to comply with the applicant's or manufacturer's requirements under the revised or new program, standard, or facility-related policy will not be eligible for any bonus, incentive, rebate, or other benefit under the revised or new program but shall remain entitled to all benefits under the prior program according to the terms of the prior program in place when the dealer began to perform under the program. If the prior program under which the dealer completed a facility construction or substantial alteration does not contain a specific time period during which the manufacturer or distributor must provide payments or benefits to a dealer, then

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the manufacturer or distributor may not deny the dealer payment or benefits under the terms of that prior program, as it existed when the dealer began to perform under the prior program, for the balance of the ten-year period, regardless of whether the manufacturer's or distributor's facility program has been changed or canceled.

(xxiii) To require, coerce, or attempt to coerce a dealer located in this state to purchase goods or facility construction or maintenance services for items not trademarked or otherwise directly protected by federal intellectual property rights of the manufacturer from a vendor selected, identified, or designated by a manufacturer, distributor, affiliate, or captive finance source when the dealer may obtain goods or facility construction or maintenance services for items not trademarked or otherwise directly protected by federal intellectual property rights of the manufacturer of the same quality, material, and design from a vendor selected by the dealer, provided the dealer obtains prior approval from the manufacturer, distributor or affiliate, for the use of the dealer's selected vendor. Goods shall include signs or sign components to be purchased or leased by the dealer which are not trademarked or otherwise directly protected by the federal intellectual property rights of the manufacturer. Such approval by the manufacturer, distributor or affiliate may not be unreasonably withheld. For purposes of this subdivision, the term "goods" does not include moveable displays,

brochures, and promotional materials containing material subject to the intellectual property rights of a manufacturer or distributor, or special tools as reasonably required by the manufacturer, or parts to be used in repairs under warranty or recall obligations of a manufacturer or distributor. If the manufacturer, distributor or affiliate claims that a vendor chosen by the dealer cannot supply goods or facility construction or maintenance services for items not trademarked or otherwise directly protected by federal intellectual property rights of the manufacturer which are the same quality, material, and design, the dealer may file a protest with the commission. When a protest is filed, the commission shall promptly inform the manufacturer, distributor, affiliate, or captive finance source that a protest has been filed. The commission shall conduct a hearing on the merits of the protest within ninety (90) days following the filing of a response to the protest. The manufacturer, distributor or affiliate shall bear the burden of proving that the goods or facility construction or maintenance services for items not trademarked or otherwise directly protected by federal intellectual property rights of the manufacturer chosen by the dealer are not of the same quality, material or design to those required by the manufacturer, distributor or affiliate.

This paragraph (d) shall not apply to manufacturers of motor homes governed by the provisions of Sections 63-17-201 through 63-17-221.

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- the State of Mississippi, or to the several counties or municipalities thereof, or to any other political subdivision thereof, no manufacturer, distributor or wholesaler shall offer any discounts, refunds, or any other similar type inducements to any dealer without making the same offer or offers to all other of its dealers within the state. If the inducements above mentioned are made, the manufacturer, distributor or wholesaler shall give simultaneous notice thereof to all of its dealers within the state.
- (3) It is unlawful to be a broker. For the purpose of this subsection, "broker" means a person who, for a fee, commission or other valuable consideration, arranges or offers to arrange a transaction involving the sale, for purposes other than resale, of a new motor vehicle, and who is not:
- (a) A new motor vehicle dealer or agent or employee of such a dealer; or
- (b) A distributor or an agent or employee of such a distributor.

However, an individual shall not be deemed to be a broker if he or she is the owner of the new or used motor vehicle which is the object of the brokering transaction.

(4) (a) For purposes of this subsection, the term

"Stop-Sale" or "Do-Not-Drive" order means a notification issued by
a manufacturer to its franchised new motor vehicle dealers stating

that certain used vehicles in inventory shall not be sold or leased, at either retail or wholesale, due to a federal safety recall for a defect or noncompliance, or a federal emissions recall.

- (b) A manufacturer shall compensate its new motor

 vehicle dealers for all labor and parts required by the

 manufacturer to perform recall repairs. Compensation for recall

 repairs shall be reasonable. If parts or a remedy are not

 reasonably available to perform a recall service or repair on a

 used vehicle held for sale by a dealer authorized to sell and

 service new vehicles of the same line-make within thirty (30) days

 of the manufacturer issuing the initial notice of recall, and the

 manufacturer has issued a Stop-Sale or Do-Not-Drive order on the

 vehicle, the manufacturer shall compensate the dealer at a

 prorated rate of at least one percent (1%) of the value of the

 vehicle per month beginning on the date that is thirty (30) days

 after the date on which the Stop-Sale or Do-Not-Drive order was

 provided to the dealer until the earlier of either of the

 following:
- (i) The date the recall or remedy parts are made available; or
- (ii) The date the dealer sells, trades, or otherwise disposes of the affected used motor vehicle.
- (c) The value of a used vehicle shall be the average trade-in value for used vehicles as indicated in an independent

third party guide for the year, make, and model, of the recalled vehicle.

- (d) This subsection shall apply only to used vehicles subject to safety or emissions recalls pursuant to and recalled in accordance with federal law and regulations adopted thereunder and where a Stop-Sale or Do-Not-Drive order has been issued and repair parts or remedy remain unavailable for thirty (30) days or longer. This subsection further shall apply only to new motor vehicle dealers holding an affected used vehicle for sale:
- (i) In inventory at the time the Stop-Sale or Do-Not-Drive order was issued; or
- (ii) Which was taken in the used vehicle inventory of the dealer as a consumer trade-in incident to the purchase of a new vehicle from the dealer after the Stop-Sale or Do-Not-Drive order was issued; and
- (iii) That are a line-make that the dealer is franchised to sell or on which the dealer is authorized to perform recall repairs.
- manufacturer to reduce the amount of compensation otherwise owed to an individual new motor vehicle dealer, whether through a chargeback, removal of the individual dealer from an incentive program or reduction in amount owed under an incentive program solely because the new motor vehicle dealer has submitted a claim for reimbursement under this subsection. This subsection shall

not apply to an action by a manufacturer that is applied uniformly among all dealers of the same line-make in the state.

- dealers pursuant to this subsection for recall remedies or repairs, or for compensation where no part or repair is reasonably available and the vehicle is subject to a Stop-Sale or Do-Not-Drive order shall be subject to the same limitations and requirements as a warranty reimbursement claim made under paragraph (j) of Section 63-17-85. In the alternative, a manufacturer may compensate its franchised dealers under a national recall compensation program provided the compensation under the program is equal to or greater than that provided under paragraph (b); or the manufacturer and dealer otherwise agree.
- (g) A manufacturer may direct the manner and method in which a dealer must demonstrate the inventory status of an affected used motor vehicle to determine eligibility under this subsection, provided that the manner and method may not be unduly burdensome and may not require information that is unduly burdensome to the dealer.
- (h) Nothing in this <u>subsection</u> shall require a manufacturer to provide total compensation to a dealer which would exceed the total average trade-in value of the affected used motor vehicle as originally determined under paragraph (b) of this subsection (4).

vehicle is available under a federal statute or regulation, then a dealer may opt to be compensated under either the federal statute or authority of this subsection but may not combine the remedies.

SECTION 2. This act shall take effect and be in force from and after July 1, 2019.

PASSED BY THE HOUSE OF REPRESENTATIVES

February 7, 2019

SPEAKER OF THE HOUSE OF REPRESENTATIVES

rejout 3/22/2019 2:57pm

PASSED BY THE SENATE

March 12, 2019

PRESIDENT OF THE SENATE

APPROVED BY THE GOVERNOR

GOVERNOR

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